No. 08-5657

Title:	Lawrence W. Nelson, aka Zikee, Petitioner v. United States
Docketed:	August 7, 2008
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(06-4456)
Decision Date:	May 9, 2008

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 5 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 8, 2008)
Aug 13 2008	Waiver of right of respondent United States to respond filed.
Aug 21 2008	DISTRIBUTED for Conference of September 29, 2008.
Aug 27 2008	Response Requested . (Due September 26, 2008)
Sep 17 2008	Order extending time to file response to petition to and including October 27, 2008.
Oct 21 2008	Order further extending time to file response to petition to and including November 26, 2008.
Nov 26 2008	Brief of respondent United States filed.
Dec 11 2008	DISTRIBUTED for Conference of January 9, 2009.
Jan 12 2009	DISTRIBUTED for Conference of January 16, 2009.
Jan 21 2009	DISTRIBUTED for Conference of January 23, 2009.
Jan 26 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment REVERSED and case REMANDED. Justice Breyer filed an opinion concurring in the judgment in which Justice Alito joins. Opinion per curiam. (Detached Opinion)
Feb 27 2009	JUDGMENT ISSUED.

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Party name: United States		

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NO. ORIGINAL (2)

In The

Supreme Court of the United States

08-5657

Supreme Court, U.S.
FILED
AUG - 5 2008
OFFICE OF THE CLERK

LAWRENCE W. NELSON, a/k/a Zikee,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Circuit's holding that sufficient evidence existed to support the Defendant's conviction for conspiring to possess with the intent to distribute, and to distribute cocaine base, in violation of 21 U.S.C. § 846, where the government failed to prove the existence of a conspiracy or the Defendant's agreement to join in the same as charged in the indictment is contrary to this Court's decision in Glasser v. United States, 315 U.S. 60, 80 (1942).

II. Whether the Fourth Circuit's holding that the cumulative effect of the District Court's evidentiary rulings did not result in a curtailment of Defendant's presentation of his theory of defense, thus depriving the Defendant of a fair trial contrary to Fed R. Evid. 611(a) and Fed R. Evid. 614(b).

III. Whether the Fourth Circuit's holding is contrary to this Court's decision in United States v. Booker in that the Fourth Circuit did not require that the Defendant's sentence be vacated and remanded for resentencing because the District Court treated the federal sentencing guidelines as mandatory when it sentenced him and is not entitled to the presumption of reasonableness in light of Rita v. United States, 127 S. Ct. 2456 (2007) and Gall v. United States, 128 S. Ct. 586, 596 (2007).

IV. Whether the Fourth Circuit's holding that the District Court did not err when it denied the Defendant's motion to reopen it's case and present testimony that was critical to a main point of his theory of the case and when the motion was made prior to the instruction of the jury and the closing argument of the government and the Defendant is improper.

V. Whether the Fourth Circuit's holding that the District Court did not err when it refused to grant the Defendant's motion to continue the trial because of the revelation of voluminous witnesses and documents by the government immediately prior to trial is improper.

VI. Whether the Fourth Circuit's holding that the District Court did not err when it permitted the government to use the testimony of a witness who was arrested with the Defendant in it's case-in-chief when the district Court had previously ruled that the arrest was improper and that the evidence seized were suppressed which the Defendant contended was fruits of the poisonous tree and should be suppressed as well was improper.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the courts below are named in the caption of this case.

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The Petitioner Lawrence W. Nelson, a/k/a Zikee prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fourth Circuit on July 30, 2007 (previously vacated and remanded to the United States Court of Appeals for the Fourth Circuit on January 22, 2008 by this Court see 128 S. Ct. 1124 (2008) [case number 07-7380] and the opinion and judgment entered by the United States Court of Appeals for the Fourth Circuit on May 9, 2008.

OPINION BELOW

The opinions of the U.S. Court of Appeals for the Fourth Circuit in this case is unpublished. The opinions are appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the Court of Appeals were entered on July 30, 2007; vacated and remanded by this Court on January 8, 2008; re-considered and entered on May 9, 2008. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT

Lawrence W. Nelson a/k/a Zikee, (herein "Defendant" or "Nelson") was named in counts one, ten, and twelve of a twelve-count indictment returned September 4, 2003, by a federal grand jury sitting in the Northern District of West Virginia.

Count one of the indictment alleged that Nelson along with codefendants James Curtis Chappelle, a/k/a Dog Nuts, Richard Paul McDonald, Katrina

\Michelle Taylor, Heather Michele Cecil, Edward Brown Hollins, Jr., and Sandra Kaye Tennant, did unlawfully possess with intent to distribute and to distribute in excess of 50 grams of cocaine base, also known as "crack", and cocaine hydrochloride, also known as "coke", in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(A)(iii).

Count ten of the indictment alleged that Nelson and Sandra Kaye Tennant, aided and abetted by each other, did unlawfully distribute .58 grams of cocaine base, also known as "crack", in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2.

Count twelve of the indictment alleged that Nelson did unlawfully possess with intent to distribute approximately 2.02 grams of cocaine base, also known as "crack", in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C)

A motion was filed to suppress all evidence obtained as the result of a 5/23/03 traffic stop and to dismiss count twelve of the indictment on 10/22/03 by the Defendant. (JA 14) A hearing was held on the motion and the evidence from the traffic stop was suppressed by the District Court.

The government moved to dismiss count twelve of the indictment and count twelve was dismissed.

The Defendant filed motions to continue the trial of the matter. The trial of the matter was held on July 1, 2004 thru July 2, 2004; July 6, 2004 thru July 7, 2004; and July 12, 2004 wherein the government presented testimony of 32 witnesses. A verdict was returned July 13, 2004 by the jury finding the Defendant Guilty of Count one of the indictment and Not Guilty as to Count ten of the indictment.

The Defendant filed motions for a new trial of the matter on August 13, 2004 and August 17, 2004. The motion was denied. A presentence report was prepared and submitted to the district court . The Defendant was sentenced to the Bureau of Prisons for 360 months followed by 5 years supervised release on Count one of the indictment.

On appeal, Nelson argued that there was not evidence of a conspiracy sufficient for a conviction; the cumulative effect of the District Court's evidentiary rulings resulted in curtailment of his presentation and theory of defense depriving him of a fair trial; the District Court's denial of a motion to reopen the case and/or the motion to continue the trial deprived Nelson of a fair trial; and ultimately the adoption of a mandatory sentencing scheme by the District Court violated the *Booker* decision by this Court. The Fourth Circuit disagreed, ruling that no error was committed and that the District Court rulings were affirmed. Appendix at 9a.

This Court vacated the holding of the Fourth Circuit and remanded the matter for further consideration by the Fourth Circuit in light of Rita v. United States, 127 S. Ct. 2456 (2007). Upon re-consideration of the matter the Fourth Circuit again ruled no error was committed and that the District Court rulings were again affirmed. Appendix at 1a.

REASON FOR GRANTING THE WRIT

The Fourth Circuit's holding that sufficient evidence existed to support the Defendant's conviction for conspiring to possess with the intent to distribute, and to distribute cocaine base, in violation of 21 U.S.C. § 846, where the government failed to prove the existence of a conspiracy or the Defendant's agreement to join in the same as charged in the indictment is contrary to this Court's decision in Glasser v. United States, 315 U.S. 60, 80 (1942).

The Government Failed to Introduce Sufficient Evidence to Sustain the Jury's Verdict of Guilty as to Count One Alleged Against the Defendant. This Court has instructed that sufficiency of the evidence claims are to be reviewed under the standard announced in Glasser v. United States, 315 U.S. 60, 80 (1942): The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. United States v. Ham, 998 F.2d 1247, 1254 (4th Cir. 1993). Furthermore, in determining the issue of substantial evidence, the court neither weighs the evidence nor considers the credibility of witnesses. United States v. Arrington, 719 F.2d 701 (4th Cir. 1983).

The Defendants Conviction for Conspiring to Possess with the Intent to Distribute and to Distribute Cocaine Base, also known as "crack", and cocaine hydrochloride, also known as "coke", in Violation of 21 U.S.C. § 846 Must Be Reversed Because the Government Failed to Prove any Agreement Between Nelson and any Other Person, to Violate the Controlled Substances Act.

Count One of the indictment charged the Defendant, Lawrence W. Nelson a/k/a Zikee, and others, with conspiring to willfully possess cocaine base and cocaine hydrochloride with the intent to distribute it in violation of 21 U.S.C. § 846 (JA 44-45). To prove conspiracy to possess cocaine base or cocaine hydrochloride with the intent to distribute it, the government must show: (1) an agreement to possess cocaine with the intent to distribute it existed between two or more persons; (2) the defendant knew of the agreement; and (3) the defendant knowingly and voluntarily joined in the agreement. United States v. Burgos, 94 F.3d 849, 857 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1087 (1997). As previously explained by this Court, the heart of the crime of conspiracy is an agreement to effectuate a criminal act. United States v. Laughman, 618 F.2d 1067, 1074 (4th Cir.), cert. denied, 447 U.S. 925 (1980).

Generally, the government must establish the existence of a conspiracy, as a general matter, and then show the membership of or an association by a particular

defendant with one or more of the conspirators so as to tie him to the conspiracy. The case of United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976) is instructive.

At this preliminary stage, the conspiracy need not be proved beyond a reasonable doubt. United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976). The government can discharge its burden by introducing, substantial, independent evidence of the conspiracy, at least enough to take the question to the jury. United States v. Nixon, 418 U.S. 683, 701 n. 14 (1974)(dictum). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge. Id.

The Defendant contends that the application of the foregoing conspiracy principles, as embodied in Stroupe, have no place in this case. This is so simply because no acts or statements of either Nelson or any other individual were offered as evidence that either defendant, individually or with another person, was a member of any conspiracy. At best, and in the light most favorable to the government, all that can be said of Nelson's actions are that they were consistent with that of an independent seller; Nelson simply sold cocaine to others on a number of occasions.

The Fourth Circuit's holding that the cumulative effect of the District Court's evidentiary rulings did not result in a curtailment of Defendant's presentation of his theory of defense, thus depriving the Defendant of a fair trial is contrary to Fed R. Evid. 611(a) and Fed R. Evid. 614(b).

The District Court, in a persistent pattern, prevented Nelson from developing his defense by its rulings to exclude witnesses presented by the defense and otherwise committed reversible error by allowing the testimony of government witnesses that the defense contended were not timely disclosed. Since defendant Nelson objected to the court's rulings, the standard this Court should use to review whether the District Courts behavior deprived him of a fair trial is an abuse of discretion. United States v. Seeright, 978 F.2d 842, 847 (4th Cir. 1992).

The District Court abandoned it's neutral role in this case. Defendant Nelson is cognizant of the fact that the district court clearly has the inherent as well as statutory (Fed. R. Evid. 611(a); Fed. R. Evid. 614(b)) authority to question witnesses and control court proceedings to clarify ambiguities or questions raised by the witness testimony or counsels interrogation. It is axiomatic that "[t]he district court has the duty to conduct a jury trial in a general atmosphere of impartiality" (quoting United States v. Cassiagnol, 420 F.2d 868, 878 (4th Cir.), cert. denied, 397 U.S. 1044 (1970)). However, Nelson respectfully argues that a pattern, amply demonstrated on the record as a whole, developed in this case

which constitutes a colorable, and indeed, viable, claim that the trial judges rulings conveyed such an impression of outright advocacy on the courts part that they must have been taken by the jury to reflect an underlying belief that Nelson was guilty. See United States v. Head, 697 F.2d 1205, 1209 (4th Cir. 1982).

Defendant objected to the introduction of testimony from Anthony Powell and asked if the Court was to let him testify that he be given a continuance. The Defendant further objected to the inclusion of Mr. Power because of his late disclosure and the understanding that trial counsel had that he would not testify for the government. The Court overruled these objections and continued with the trial.

The testimony of Mr. William Lohr was also permitted over objection despite it's disclosure during the trial of the matter. The Court prohibited the effective impeachment of witnesses by stopping cross-examination of witnesses and sidebar conferences. Prevention of showing bias through cross-examination of Ed Hollins.

The Defendant further objected to the testimony of Jamal Eddings for late disclosure and lack of materials and the Court continued to overrule his objection. The Court further permitted Joe Adams to testify beyond his factual knowledge and understanding of the investigation of the case over objection of the Defendant.

The Fourth Circuit's holding is contrary to this Court's decision in United States v. Booker in that the Fourth Circuit did not require that the Defendant's sentence be vacated and remanded for resentencing because the District Court treated the federal sentencing guidelines as mandatory when it sentenced him.

United States v. Booker, 543 U.S. 220, 120 S. Ct. 738, 160 L. Ed. 2d 621 (2005) and United States v. Hughes, 401 F.3d 254 (4th Cir. 2005) require that this Court vacate the sentence imposed and remand the matter for re-sentencing. The District Court treated the sentencing guidelines as mandatory by stating that "the guidelines are advisory but under the case law of the Fourth Circuit Court of Appeals .... the Guidelines are considered presumptively reasonable. Now here is what that means. That means that unless there's a good reason in the factors that I just reviewed with you, the Guideline sentence is the reasonable sentence in this case."

The statement made by the District Court indicates that it viewed the Guidelines as mandatory and requires the reversal of the sentence and remand to the District Court for re-sentencing.

The analysis of the application of Rita v. United States and Gall v. United States to this case by the Fourth Circuit in concluding that the totality of the circumstances shown from the record demonstrating the District Court did not

consider the Guidelines as mandatory was in error and requires the reversal of the sentence and remand to the District Court for re-sentencing.

The Fourth Circuit's holding that the District Court did not err when it denied the Defendant's motion to reopen it's case and present testimony that was critical to a main point of his theory of the case and when the motion was made prior to the instruction of the jury and the closing argument of the government and the Defendant is improper.

The Court of Appeals and District Court denied the Defendant his sixth amendment right to present his best defense. *U.S. Const. Amend VI.* The Defendant requested that the Court allow the Defendant to reopen his case-in-chief and present additional testimony. Prior to the presentation of the Defendant's case the Defendant's trial counsel advised the District Court of the names and anticipated testimony of the witnesses he anticipated to call. The government objected to several of his witnesses and excluded by the District Court.

Among those witnesses was Joseph Defanso whom the Defendant expected to testify that Ed Hollins, a government witness, had previously informed him that Mr. Hollins and Mr. Nelson had a past dispute regarding Mr. Nelson's accusations of Mr. Hollins sexual improprieties with a 14 year old girl as well as Mr. Hollin's belief that Mr. Nelson had slept with Mr. Hollins wife. The Court exclude the testimony of Mr. Defanso.

Upon resting his case-in-chief the Defendant contacted his counsel following a conversation with Mr. Defanso at the North Central Regional Jail that evening. The Defendant corrected his counsel that the testimony of Mr. Defanso was that Mr. Hollins had specifically informed him that he had lied about Mr. Nelson's involvement with criminal activity in this matter and Mr. Hollins intended to perjure himself with regard to Mr. Nelson's involvement. Mr. Defanso and Mr. Nelson both left a tape recorded message at the defense trial counsel's office that evening.

Pursuant to United States v. Peay, 972 F.2d 71 (4th Cir. 1992) and United States v. Nunez, 432 F.3d 573 (4th Cir. 2005) the trial court is required to consider the timeliness of the motion to reopen, character of the testimony, and the effect of granting the motion. The Defendant informed the Court of his position of the motion was timely; that it was reasonable that it was not offered before resting his case-in-chief given (1) the ruling of the District Court that he could not offer Mr. Defanso's testimony, (2) Trial counsel for the Defendant had not talked to Mr. Defanso, and (3) the evidence the witness would testify was more extensive than that previously submitted to the District Court .

The evidence was relevant and admissible under Rules 401, 801(c), and 807 of the Federal Rules of Evidence as set forth by trial counsel. The receipt of the

evidence by the jury would not cause prejudice since the District Court had not instructed the jury and no closing arguments had been presented to the jury. It has been held by the United States Supreme Court that sometimes the right of the Defendant to call witnesses may sometimes trump state and federal evidentiary rules and statutes in Washington v. Texas, 388 U.S. 14 (1967).

The Fourth Circuit's holding that the District Court did not err when it refused to grant the Defendant's motion to continue the trial because of the revelation of voluminous witnesses and documents by the government immediately prior to trial is improper

Counsel for the Defendant notified the District Court that it needed more time to investigate the witnesses called by the government which the Defendant contended were not previously disclosed. It is the contention of the Defendant that the government was given an unfair tactical advantage at trial by the District Court not permitting the defense adequate time to prepare and have adequate cross-examination.

The right to an effective cross-examination is a constitutional right. Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The trial court does not have total discretion to limit this right until the Defendant has substantially exercised this right. See United States v. Jordan, 466 F.2d 99, 105

(4th Cir. 1972) quoting United States v. Dickens, 417 F.2d 958, 961 (8th Cir. 1969).

The Defendant had a right to inquire into the bias of the government witnesses. In this case the Defendant had no way to know whether bias or a prior inconsistent statement may have been given because the District Court's ruling to continue with the trial effectively shut off the ability of the Defendant to inquire intelligently about the subjects.

Defendant objected to the introduction of testimony from Anthony Powell and asked if the Court was to let him testify that he be given a continuance. The Defendant further objected to the inclusion of Mr. Power because of his late disclosure and the understanding that trial counsel had that he would not testify for the government. The Court overruled these objections and continued with the trial.

The testimony of Mr. William Lohr was also permitted over objection despite it's disclosure during the trial of the matter. The Court prohibited the effective impeachment of witnesses by stopping cross-examination of witnesses and sidebar conferences. Prevention of showing bias through cross-examination of Ed Hollins.

The Defendant further objected to the testimony of Jamal Eddings for late disclosure and lack of materials and the Court continued to overrule his objection. The Court further permitted Joe Adams to testify beyond his factual knowledge and understanding of the investigation of the case over objection of the Defendant.

The Fourth Circuit's holding that the District Court did not err when it permitted the government to use the testimony of a witness who was arrested with the Defendant in it's case-in-chief when the district Court had previously ruled that the arrest was improper and that the evidence seized were suppressed which the Defendant contended was fruits of the poisonous tree and should be suppressed as well was improper.

The permission by the District Court to permit the testimony of William Lohr, Sr. Was error contrary to the 4th Amendment of the U.S. Constitution and requires the conviction to be reversed because it was "fruit of the poisonous tree" and should have been excluded. In approximate May 23, 2003 the Defendant was arrested in Monongalia County, West Virginia following a traffic stop. William Lohr, Sr. Was also arrested and both individuals were transported to the North Central Regional Jail together. Mr. Lohr contends that when he and Mr. Nelson were being transported to the North Central Regional Jail, that Mr. Nelson asked Mr. Lohr to say the jacket seized following a traffic stop was his jacket and that the substance found therein was his property.

As stated previously the District Court ruled that the traffic stop was improper and suppressed all evidence seized from the Defendant during the search (JA 24). The Defendant contends any statements allegedly made by Mr. Nelson to Mr. Lohr or statements overheard by Mr. Lohr between Mr. Nelson and any other individual were solely because of his improper arrest from the traffic stop and that the statements should not have been introduced since they are "fruits of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The introduction of the statements and testimony of Mr. Lohr violate Mr. Nelson's constitutional rights against unlawful search and seizure since the statements would not have been made or come to light had he not been arrested and transported to jail with Mr. Lohr in May, 2003 improperly. This requires the reversal of the Defendant's conviction.

Because of the importance of the issues presented, and the fact that the Fourth Circuit's decision is contrary to this Court's precedent, this Court should grant certiorari, review Nelson's case, and vacate his conviction.

CONCLUSION

For these reasons, Petitioner Nelson asks that this Honorable Court grant a writ of certiorari and review the judgments of the court of appeals.

Respectfully Submitted,

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*Court Appointed Counsel for Petitioner

Dated: August 5, 2008

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4456

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LAWRENCE W. NELSON, a/k/a Zikee,

Defendant - Appellant.

On Remand from the Supreme Court of the United States.
(S. Ct. No. 07-7380)

Submitted: April 23, 2008 Decided: May 9, 2008

Before NIEMEYER and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Christopher A. Davis, DAVIS LAW OFFICES, Clarksburg, West Virginia, for Appellant. Sharon L. Potter, United States Attorney, Zelda E. Wesley, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This case is before us on remand from the United States Supreme Court for further consideration in light of Rita v. United States, 127 S. Ct. 2456 (2007). In United States v. Nelson, 237 F. App'x 819 (4th Cir. 2007), vacated, 128 S. Ct. 1124 (2008), we affirmed Lawrence W. Nelson's 360-month sentence imposed by the district court after a jury convicted Nelson of conspiracy to distribute and possess with intent to distribute more than fifty grams of crack cocaine, in violation of 21 U.S.C. § 846 (2000). After reviewing Nelson's appeal in light of Rita, we affirm.*

In Rita, the Supreme Court held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." 127 S. Ct. at 2462. The Court stressed "that the presumption . . . is an appellate court presumption." Id. at 2465. Importantly, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Id.

In sentencing a defendant after United States v. Booker, 543 U.S. 220 (2005), a district court must engage in a multi-step process. First, the court must correctly calculate the appropriate advisory guidelines range. Gall v. United States, 128 S. Ct. 586, 596 (2007) (citing Rita, 127 S. Ct. at 2465). The court then must

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*In the prior appeal, Nelson also challenged his conviction on several grounds. We reinstate our prior opinion affirming his conviction. See Nelson, 237 F. App'x at 820-21.

consider that range in conjunction with the factors set forth in 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2007). Id. The court "may not presume that the Guidelines range is reasonable" but, rather, "must make an individualized assessment based on the facts presented" in determining an appropriate sentence. Id. at 596-97. The district court also must "adequately explain the chosen sentence to allow for meaningful appellate review." Id. at 597.

Appellate review of a district court's imposition of a sentence is for abuse of discretion. Id.; see also United States v. Pauley, 511 F.3d 468, 473 (4th Cir. 2007). The appellate court:

> must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

Gall, 128 S. Ct. at 597.

Here, Nelson asserts that the district court applied the guidelines in a mandatory fashion. He relies on the district court's statement at sentencing "that 'the guidelines are advisory but under the case law of the Fourth Circuit Court of Appeals . . .

the Guidelines are considered presumptively reasonable . . . . That means that unless there's a good reason in the factors that I just reviewed with you, the Guideline sentence is the reasonable sentence . . . .'"

Although Nelson asserts that the district court treated the guidelines as mandatory, we find, taking the district court's comments at sentencing as a whole, the court did not do so. See United States v. Go, 517 F.3d 216, 218-20 (4th Cir. 2008). As in Go, the district court in Nelson's case understood that the guidelines were advisory and that it could impose a sentence outside of the guidelines range. For example, the district court considered the arguments from Nelson and his witnesses, the advisory guideline range, and the factors in § 3553(a), noting that Nelson was convicted of a crack offense, was a leader in the offense, possessed a firearm, had a significant criminal history, and had made laudable efforts at self-rehabilitation. Given the circumstances of Nelson's case, however, the district court exercised its discretion not to vary from the advisory guideline range and decided to impose a sentence at the bottom of the range. We therefore find that the district court did not procedurally err in sentencing Nelson. See Go, 517 F.3d at 218-20.

Accordingly, we affirm the 360-month sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: May 9, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4456
(1:03-cr-00049-IMK)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LAWRENCE W. NELSON, aka Zikee,

Defendant - Appellant

J U D G M E N T

The Supreme Court of the United States has remanded this case to this Court for further action.

In accordance with the order of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 25, 2008

Clerk
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Room 501
Richmond, Virginia 23219

FILED
FEB 29 2008
US Court of Appeals
4th Circuit

Re: Lawrence W. Nelson, aka Zikee
v. United States
No. 07-7380 (Your docket No. 06-4456)

Dear Clerk:

Enclosed please find a certified copy of the judgment of this Court in the above-entitled case. You may obtain a copy of the opinion cited in the judgment by visiting our website at www.supremecourtus.gov.

Kindly acknowledge receipt on the attached copy of this letter.

Sincerely,

WILLIAM K. SUTER, Clerk

By Elizabeth L. Brown

Elizabeth Brown
Judgments/Mandates Clerk

Enc.
cc: Christopher A. Davis, Esq.
Solicitor General

Supreme Court of the United States

No. 07-7380

LAWRENCE W. NELSON, aka ZIKEE,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Rita v. United States*, 551 U.S. ___ (2007).

January 22, 2008

A True copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____ Deputy

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4456

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LAWRENCE W. NELSON, a/k/a Zikee,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Chief District Judge. (1:03-cr-00049-IMK)

Submitted: June 29, 2007 Decided: July 30, 2007

Before NIEMEYER and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Christopher A. Davis, DAVIS LAW OFFICES, Clarksburg, West Virginia, for Appellant. Sharon L. Potter, United States Attorney, Zelda E. Wesley, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lawrence W. Nelson appeals his conviction by a jury of conspiracy to distribute and possess with intent to distribute more than fifty grams of crack cocaine, in violation of 21 U.S.C. § 846 (2000). The district court sentenced him to a 360-month term of imprisonment, the bottom of the advisory sentencing guideline range. Nelson appeals his conviction and sentence, asserting that the evidence was insufficient to convict, that the district court abused its discretion in making certain evidentiary rulings and in denying his motion for a continuance and to reopen his case, and that the court essentially sentenced him under a mandatory guideline scheme. We affirm.

Nelson first asserts that the evidence was insufficient to convict him of conspiracy to possess with intent to distribute and to distribute crack cocaine because the Government failed to prove an agreement between Nelson and another person. This court reviews de novo the district court's decision to deny a motion filed pursuant to Fed. R. Crim. P. 29. United States v. Smith, 451 F.3d 209, 216 (4th Cir.), cert. denied, 127 S. Ct. 197 (2006). Where, as here, the motion was based on a claim of insufficient evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); Smith, 451 F.3d at 216. This court "can reverse a

conviction on insufficiency grounds only when the prosecution's failure is clear." United States v. Moye, 454 F.3d 390, 394 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 127 S. Ct. 452 (2006).

We have carefully reviewed the trial testimony and are convinced that the Government established a loosely-knit association of members, including Nelson, whose purpose was to distribute crack cocaine in West Virginia. See United States v. Strickland, 245 F.3d 368, 384-85 (4th Cir. 2001) (discussing elements of offense); see also United States v. Cardwell, 433 F.3d 378, 390 (4th Cir. 2005) ("The existence of a tacit or mutual understanding between conspirators is sufficient evidence of a conspiratorial agreement.") (internal quotation marks and citation omitted), cert. denied, 126 S. Ct. 1669 (2006). Although Nelson asserts that he merely had buyer-seller relationships with those individuals, we conclude that the jury could infer that a conspiracy existed from the amount of drugs exchanged. See United States v. Mills, 995 F.2d 480, 485 n.1 (4th Cir. 1993) ("[E]vidence of a buy-sell transaction, when coupled with a substantial quantity of drugs, would support a reasonable inference that the parties were coconspirators."). Thus, we find that the evidence was sufficient to convict Nelson of conspiracy to distribute crack cocaine.

Next, Nelson challenges certain evidentiary rulings on the ground that the rulings prevented him from developing his defense. Nelson points to, inter alia, the district court's decision to allow Anthony Powell and Jamal Eddings to testify despite their alleged late disclosure, to allow William Lohr to testify where the substance of his testimony was not disclosed until several days into the trial, to allow Sergeant Adams to testify as a summary witness, and to limit counsel's cross-examination of Edward Hollins. We find no abuse of discretion in the district court's evidentiary rulings. See United States v. Cooper, 482 F.3d 658, 662-63 (4th Cir. 2007) (stating standard of review).

To the extent that Nelson also contends the cumulative effect of the district court's evidentiary rulings amounted to partiality that denied him a fair trial, we review this claim for plain error because Nelson failed to object on this ground in the district court. See United States v. Smith, 452 F.3d 323, 330 (4th Cir.) (providing standard), cert. denied, 127 S. Ct. 694 (2006). Our review of the trial testimony convinces us that there was no error-plain or otherwise-on the district court's part. Moreover, the court instructed the jury that it should not draw any inferences from the court's statements, rulings, questions, remarks, or comments and should judge independently the questions of fact in Nelson's case. See United States v. Smith, 441 F.3d

254, 269 (4th Cir.) (stating that any "cumulative effect of the interventions by the court . . . was ameliorated by the instructions to the jury[,]" and "[j]urors are presumed to adhere to cautionary instructions issued by the district court"), cert. denied, 127 S. Ct. 226 (2006). We therefore find that Nelson is not entitled to relief on this claim.

Nelson asserts that the district court erred by denying his requests for a continuance for counsel to prepare for witnesses not previously disclosed by the Government and by denying his motion to reopen his case in chief to present additional testimony. Our review of the district court's decisions leads us to conclude that the court did not abuse its discretion in denying either motion. See United States v. Williams, 445 F.3d 724, 738 (4th Cir.) (stating standard of review for denial of motion for continuance), cert. denied, 127 S. Ct. 314 (2000); United States v. Nunez, 432 F.3d 573, 579 (4th Cir. 2005) (providing standard for motion to reopen).

Finally, it is well established in this circuit that a sentence imposed within a properly calculated guideline range is presumed to be reasonable. See, e.g., United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir.), petition for cert. filed, ___ U.S.L.W. ___ (U.S. July 21, 2006) (No. 06-5439); United States v. Johnson, 445 F.3d 339, 341-42 (4th Cir. 2006); United States v. Moreland, 437 F.3d 424, 433 (4th Cir.), cert. denied, 126 S. Ct.

2054 (2006); United States v. Green, 436 F.3d 449, 457 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006). Nelson claims that the district court's reliance on this presumption of reasonableness rendered the guidelines sentence it imposed mandatory in contravention of United States v. Booker, 543 U.S. 220 (2005). We find that Nelson's argument is foreclosed by the Supreme Court's decision in Rita v. United States, ___ U.S. ___, ___, 2007 WL 1772146, at *3, *6 (U.S. June 21, 2007) (No. 06-5754).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT

FILED: July 30, 2007

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 06-4456
1:03-cr-00049-IMK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LAWRENCE W. NELSON, a/k/a Zikee

Defendant - Appellant

Appeal from the United States District Court for the Northern District of West Virginia at Clarksburg

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

120
RESPONSE REQUESTED

(3)

ORIGINAL

Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

No. 08-5657

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE W. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in sentencing petitioner for his cocaine base conspiracy, the district court erred because it applied a presumption of reasonableness to the advisory Sentencing Guidelines range.

IN THE SUPREME COURT OF THE UNITED STATES

No. 08-5657

LAWRENCE W. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter, but is available at 276 Fed. Appx. 331. An earlier opinion of the court of appeals (Pet. App. 9a-14a) is also not published in the Federal Reporter, but is available at 237 Fed. Appx. 819.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2008. The petition for a writ of certiorari was filed on August 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of a drug conspiracy involving cocaine base and sentenced to 360 months of imprisonment, the bottom of the advisory Guidelines range. The court of appeals affirmed. This Court vacated the judgment and remanded for further consideration in light of Rita v. United States, 127 S. Ct. 2456 (2007). On remand, the court of appeals again affirmed.

1. Petitioner was part of "a loosely-knit association of members * * * whose purpose was to distribute crack cocaine in West Virginia." Pet. App. 11a. Employing a network of runners, petitioner regularly distributed crack cocaine at various residential and commercial locations. Gov't C.A. Br. 5. Petitioner carried a firearm during his drug distributions, traded firearms for crack cocaine, and kept a firearm where he stored his crack cocaine. Id. at 6.

On September 4, 2003, petitioner was charged, in a multi-defendant indictment, with one count of conspiracy to possess with intent to distribute and to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. 846; one count of aiding and abetting the distribution of 0.58 grams of cocaine base, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1); and one count of possession with intent to distribute 2.02 grams of cocaine base, in

violation of 21 U.S.C. 841(a)(1), a count that the district court later dismissed on the government's motion. Gov't C.A. Br. 3. In July 2004, after a two-week trial, the jury found petitioner guilty on the conspiracy count but acquitted him on the distribution count. Ibid.

2. At petitioner's sentencing, the district court calculated his total offense level under the Sentencing Guidelines as 41, using a base offense level of 36 because the conspiracy involved more than 500 grams of crack, adding two levels for possession of a firearm in relation to a drug trafficking crime, and adding three levels for petitioner's leadership role in the offense. Gov't C.A. Br. 4. Petitioner's criminal history category was VI, which yielded a recommended sentencing range under the advisory Sentencing Guidelines of 360 months to life imprisonment. Ibid. The district court sentenced petitioner at the bottom of that range, to 360 months of imprisonment. Ibid.; see C.A. J.A. 1109. The court acknowledged that "the Guidelines are advisory," id. at 1108, and it considered the sentencing factors in 18 U.S.C. 3553(a), see C.A. J.A. 1104-1108. At the same time, the court stated that "under the case law of the Fourth Circuit Court of Appeals, * * * the Guidelines are considered presumptively reasonable." Id. at 1108. The court elaborated that, in its view, that presumption means that, "unless there's a good reason in the

[Section 3553(a)] factors * * *, the Guideline sentence is the reasonable sentence in the case." Ibid.

3. The court of appeals affirmed petitioner's conviction and sentence in a unpublished per curiam opinion. Pet. App. 9a-14a. In response to petitioner's challenge to the sufficiency of the evidence to support his conviction, the court of appeals "carefully reviewed the trial testimony" and found "that the evidence was sufficient to convict [petitioner] of conspiracy to distribute crack cocaine." Id. at 11a. The court of appeals found no abuse of discretion in the district court's evidentiary rulings or in the court's denial of petitioner's request for a continuance. Id. at 12a-13a.

As for petitioner's sentence, the court of appeals stated that "it is well established in this circuit that a sentence imposed within a properly calculated guideline range is presumed to be reasonable." Pet. App. 13a (citing cases). The court of appeals added that petitioner's argument that "the district court's reliance on this presumption of reasonableness" contravened United States v. Booker, 543 U.S. 220 (2005), was "foreclosed" by this Court's subsequent decision in Rita v. United States, 127 S. Ct. 2456 (2007). Pet. App. 14a.

4. Petitioner filed a petition for a writ of certiorari, in which he contended that the district court erred by applying a presumption that a sentence within the advisory Guidelines range is

a reasonable one. 07-7380 Pet. (filed Oct. 29, 2007). In response, the government acknowledged that, in Rita, this Court held that a court of appeals may apply a presumption of reasonableness in reviewing a within-Guidelines sentence, but further stated that district courts may not presume that a within-Guidelines sentence is appropriate when they impose sentence. 07-7380 Mem. for the U.S. 1. The government conceded that, in petitioner's case, "the district court applied a presumption of reasonableness and considered the factors in 18 U.S.C. 3553(a) through the prism of that presumption." Id. at 2. Moreover, the government added, even though the district court expressed disagreement with the policy of the Guidelines in this case, the court "felt that the governing law restricted its ability to vary on that ground." Ibid. See C.A. J.A. 1109 (statement by district court that "I personally disagree with [the crack cocaine guidelines], but that doesn't mean that I can ignore them"). Because the district court applied a presumption of reasonableness to the sentencing range recommended by the Guidelines, the government recommended that "the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of Rita, subject to applicable doctrines of waiver, forfeiture, and harmless error." 07-7380 Mem. for the U.S. 2.

On January 22, 2008, this Court granted the petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded "for further consideration in light of Rita." Pet. App. 8a.

5. On remand, without requesting supplemental briefing or oral argument, the court of appeals issued another unpublished per curiam opinion affirming the 360-month sentence imposed by the district court. Pet. App. 1a-5a. After describing this Court's holding in Rita, the court of appeals again rejected petitioner's assertion that the district court treated the Guidelines as mandatory. Id. at 4a. The court of appeals stated that the district court "understood that the guidelines were advisory and that it could impose a sentence outside of the guidelines range." Ibid. The court of appeals added that "the district court exercised its discretion not to vary from the advisory guideline range and decided instead to impose a sentence at the bottom of the range." Ibid. Finding that the district court had not committed any procedural error in sentencing petitioner in that fashion, the court of appeals affirmed petitioner's sentence. Id. at 4a-5a. The court of appeals also reinstated its prior opinion affirming petitioner's conviction on the other grounds raised by petitioner before this Court's remand. Id. at 2a n.*.

DISCUSSION

Petitioner renews his contention (Pet. 10-11) that his 360-month sentence should be vacated because the district court "viewed the Guidelines as mandatory by stating that * * * 'the Guidelines are presumptively reasonable.'" Pet. 10. Petitioner argues that the court of appeals misread the record when it rejected that claim on remand from this Court's decision granting the initial petition for a writ of certiorari. Pet. 10-11.

As the government noted in response to the initial petition for a writ of certiorari, although the district court correctly recognized that the Guidelines are advisory, the court incorrectly "applied a presumption of reasonableness" to the sentencing range recommended by the Guidelines, and the court "considered the factors in 18 U.S.C. 3553(a) through the prism of that presumption." 07-7380 Mem. for the U.S. 2. That was error. This Court made clear in Rita that, although a court of appeals may apply a presumption of reasonableness when reviewing a within-Guidelines sentence on appeal, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Rita, 127 S. Ct. at 2456 (citing Booker, 543 U.S. at 259-260). The Court reiterated that point in Gall v. United States, 128 S. Ct. 586, 596-597 (2007), stating that, in considering the Section 3553(a) factors, the district court "may not presume that the Guidelines range is reasonable."

This Court granted petitioner's initial petition for a writ of certiorari, vacated the decision of the court of appeals, and remanded for "further consideration in light of Rita." Pet. App. 8a. On remand, the court of appeals indicated that it was aware that a district court may not apply a presumption that the Guidelines-recommended sentence is reasonable. See Pet. App. 2a (quoting the above-quoted language from Rita). The court of appeals nonetheless affirmed petitioner's sentence after rejecting his argument that the district court had treated the Guidelines as mandatory rather than advisory -- without directly addressing the fact that the district court had applied a presumption of reasonableness to the Guidelines-recommended sentence, i.e., the crux of the Rita error. See Pet. App. 3a ("Although [petitioner] asserts that the district court treated the guidelines as mandatory, we find, taking the district court's comments at sentencing as a whole, the court did not do so.").

In our view, the court of appeals' summary disposition on remand did not squarely address petitioner's contention in light of Rita. Although petitioner's brief did assert that the sentencing court treated the Guidelines as mandatory, the reasoning underlying that contention was that the court improperly presumed the Guidelines range to be reasonable. Petitioner supported that claim by quoting the district court's statement revealing that it had applied such a presumption in this case. See Pet. C.A. Br. 14

("The District Court treated the guidelines as mandatory by stating that 'the guidelines are advisory but * * * are considered presumptively reasonable. * * * That means that unless there's a good reason in the [Section 3553(a)] factors * * *, the Guideline sentence is the reasonable sentence in this case.'"); see also Pet. App. 14a (initial opinion of court of appeals noting that petitioner "claims that the district court's reliance on this presumption of reasonableness rendered the guidelines sentence it imposed mandatory"). Accordingly, while the court of appeals was correct that the district court recognized that the Guidelines are advisory and not mandatory, that conclusion does not dispose of the distinct argument that the district court nevertheless incorrectly applied a presumption of reasonableness.

Ordinarily, the question whether the court of appeals correctly construed an appellant's claim would not warrant this Court's attention. In this instance, however, this Court itself remanded for reconsideration in light of Rita, and it is clear that the court of appeals' reconsideration did not squarely address the significance of that opinion on the record here. That may have occurred because, on remand from this Court, neither petitioner nor the government was afforded the opportunity to respond to the Court's remand order. The omission of that step may have led the court of appeals to overlook the full significance of Rita as applied to the record here or to misconstrue petitioner's

contention as arguing only that the district court treated the Guidelines as mandatory (without regard to whether the district court applied a presumption of reasonableness). In the government's view, petitioner has fairly argued that the district court erroneously applied a presumption of reasonableness to the Guidelines range, see pp. 8-9, supra; the district court clearly erred under the later-announced rule in Rita by according such a presumption; and that error cannot be said to be harmless. See C.A. J.A. 1109 (district court stated its disagreement with the crack guidelines); Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purpose, even in a mine-run case.")

Under those circumstances, it would be appropriate for the Court once again to vacate the court of appeals' judgment and to remand for further proceedings in light of Rita and the position asserted in this brief. The court of appeals could then, after consideration of the government's position, either squarely confront the Rita problem and explain why it disagrees with petitioner's Rita argument or remand to the district court for resentencing in which the district court would not presume that a

sentence within the range recommended by the advisory Guidelines is reasonable.*

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

DANIEL S. GOODMAN
Attorney

NOVEMBER 2008

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* Petitioner also raises (Pet. 5-9, 11-16) a number of additional, fact-bound claims that the court below misapplied settled law. None of those claims involves even an alleged conflict among the courts of appeals. Accordingly, the government waives any further response to the petition unless this Court requests otherwise. See 07-7380 Mem. for the U.S. 2 n.* (similarly waiving a response to petitioner's additional claims in the initial petition for a writ of certiorari).